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Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage

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I. Introduction

For years the impact of antitrust principles on the arrangements allocating players among teams in professional sports has been hotly disputed. Now recent events seem to have brought this issue to a head. A malaise among 'good athletes like Curt Flood has increased the tempo of litigation, and an important voice in the United States Senate, Senator Sam J. Ervin, Jr., has responded to a petition for an antitrust exemption for the proposed basketball merger by calling for a full scale legislative review of the issue. We enter this crowded arena, not to solve the antitrust dilemma, but to put it to rest. For, in the form in which it is generally debated, it is an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy.

We are strongly of the view that the dispute over the impact of antitrust on the allocation of players in professional sports has, by focusing so intently upon merger and group boycott questions, generally overlooked what may be a dispositive consideration: national labor policy. For while the antitrust issue has been debated in much the same terms for more than a generation, the employment relationship in many professional sports has undergone a major change. In professional football, basketball and baseball, the players are organized in unions which are recognized by, and bargain with, their leagues. The establishment of collective bargaining, however, is not simply a change in economic structure. It also entails a change in

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legal status which has been only dimly perceived. For now another federal statute, the National Labor Relations Act, must be taken into account in the debate over the legitimacy of the arrangements allocating players among teams. We make no claim for this article as an exhaustive study of the implications of labor policy for the professional sports industry. Rather, we intend, by examining two quite different, ongoing controversies—the *Flood* litigation and the proposed basketball merger—merely to bring what we believe to be the governing principles into focus and thus to illustrate the profound impact of labor policy. First, however, we must describe the terms in which these controversies have been traditionally debated.

Casual readers of the sports pages know of the tribulations of Curt Flood, the sometime outfielder and expatriate resident of Copenhagen and Barcelona. Flood, a good ballplayer, was traded in 1969 by the St. Louis Cardinals to the Philadelphia Phillies. Inspired in part by an urge to resist treatment as a chattel (and perhaps also by W. C. Fields' alleged epitaph¹), Flood rebelled. In the face of organized baseball's refusal to let him seek employment with teams other than Philadelphia, he quit baseball for a time and, his contract having been assigned by the Phillies to the Washington Senators, a subsequent comeback attempt failed. He has now left the game forever.

Sportswriters need not fear diminished copy, however, for Curt Flood is alive and well in the Supreme Court. Having deprived the sport of his athletic skills, he turned to that other great American pastime, litigation, and sought to strip the baseball club owners of their cherished "reserve" system: a rule (or agreement between all the clubs) that the baseball services of each player are in effect the permanent property, unless assigned, of the team holding the player's contract.² Flood sued the Commissioner of Baseball and the individual

1. "I'd rather be dead than in Philadelphia."

2. The reserve "clause" is not one clause but is actually a system of provisions contained in the Major League Rules and the Uniform Player's Contract. Rule 3(a) of the Major League Rules requires every player to sign a Uniform Player's Contract drafted by the Major League Executive Council. *BASEBALL BLUE BOOK* 512 (1971). Section 10(a) of the Uniform Player's Contract provides that if a player does not sign a contract by March 1 with the club that he played for during the past season, the club may unilaterally renew his contract and cut his salary no more than twenty per cent. Any renewal contract will contain another renewal provision. Section 6(a) provides that the club may assign the player's contract to any other club in accordance with the Major League Rules.

The alleged boycott sanctions are contained in other Major League Rules. Rule 3(g) forbids clubs to negotiate with a player reserved by another club. *BASEBALL BLUE BOOK* 513-14 (1971). Rule 15 provides that a player who fails to report to his club shall be placed on a Restricted List, and that any player who violates his contract or reservation shall be placed on a Disqualified List. *Id.* at 545.

team owners, alleging, *inter alia*, that the reserve system and its boycott sanctions—each owner agrees not to employ a player who refuses to agree to the reserve clause—violates the Sherman Act.³ By way of relief, he sought money damages and an injunction restraining the defendants from agreeing to impose the reserve system on him. The District Court for the Southern District of New York rejected Flood's claims and the Court of Appeals for the Second Circuit, declining to depart from precedents of the Supreme Court, affirmed that decision. The Supreme Court has now granted certiorari.⁴

Flood's action has received wide coverage in the media. It has not been of interest only to sports fans, however, for it has also been heralded as being of legal significance. First, it raises an interesting question about the doctrine of *stare decisis*. The Supreme Court, in an opinion by Mr. Justice Holmes, held that professional baseball was not "interstate commerce" and not subject to the Sherman Act.⁵ More recently, *Toolson v. New York Yankees*⁶ reaffirmed baseball's judicially created exemption from the antitrust laws. It is clear, however, that *Toolson* is out of step with other decisions involving professional sports and a prime candidate for overruling,⁷ although there has been reliance upon it and some might argue that the proper balance of authority between the Court and Congress would be best maintained by judicial inaction.

3. In addition to his federal antitrust claims, Flood asserted three other separate causes of action in the district court. Two of those were state law claims against eleven of twenty-four club defendants, with jurisdiction based on diversity of citizenship. He alleged a violation of state antitrust law and a restraint of his common law right to engage in "the free exercise of playing professional baseball in New York, California, and the several states in which defendants stage baseball games" His final cause of action asserted that the reserve system is a form of peonage and involuntary servitude in violation of the anti-peonage statutes and the Thirteenth Amendment. *Flood v. Kuhn*, 316 F. Supp. 271, 272 (S.D.N.Y. 1970). State law claims, we believe, are preempted by the governing principles of labor law described in the text of this article. The peonage claim is disposed of at pp. 17-18 *infra*.

4. *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3135 (U.S. 1971) (No. 32, 1971 Term).

5. *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

6. 346 U.S. 356 (1953).

7. Later rulings on the scope of the commerce clause have made Mr. Justice Holmes' assertion that baseball games are "purely state affairs," 259 U.S. at 203, anachronistic. And a subsequent decision that professional football is subject to the Sherman Act, *Radovich v. National Football League*, 352 U.S. 445 (1957), has left his observation that games are not "commerce" because "personal effort, not related to production, is not a subject of commerce," 259 U.S. at 209, a glaring anomaly in the law and left *Toolson*, a ruling which applies only to professional baseball and to no other professional sport. That, however, is a distinction without a basis in antitrust policy and *Toolson* must be viewed as a departure from that policy. Indeed, the Court has conceded that the distinction may seem "illogical," "unrealistic" or "inconsistent." *Id.* at 452. Flood's action, therefore, seems to raise important questions about the impact of the doctrine of *stare decisis*.

Second, *Flood* seems important because the antitrust claims it makes threaten to restructure the professional sports industry. To the extent that professional football and basketball employ a reserve, option or other restrictive system, Flood's action clearly threatens them. Football employs a common draft which gives particular teams exclusive rights to sign graduating seniors to the standard one year option contract. A player can "play out his option" at a salary reduction of ten per cent and thus become a "free agent." But if a different club signs him, it must "compensate" his old team. If no agreement on compensation is reached, the Commissioner of Football is empowered to award players from the acquiring club to the other. This "mandatory compensation" requirement clearly lessens the bargaining power of free agents. Professional basketball, if Congress approves the proposed merger, also intends to institute a common draft for college seniors and impose a mandatory compensation provision to govern the signing of veteran free agents who play out their contracts with their teams.

A ruling striking down the reserve clause would thus seem to endanger these arrangements, although explicit congressional sanction of the football merger may leave a somewhat different legal situation in that sport.⁸ Furthermore, cases in the lower courts involving basketball indicate the law may be moving rapidly in the direction of invalidating restrictions limiting competition for players. *Robertson v. The National Basketball Association*⁹ strongly suggested the proposed basketball merger is illegal because of its impact on the players and permitted the players to challenge it. And *Haywood v. Denver Rockets*¹⁰ invalidated the National Basketball Association's four-year college rule, which forbade the drafting of a high school player until his college class was graduated and effectively excluded a large number of young athletes from professional basketball. Despite the NBA's contention that the rule should be tested by a reasonableness standard, the Court decided that the rule was a group boycott and illegal *per se*. That theory, however, if applied generally, would seem to invalidate all concerted arrangements allocating players among teams.

Beyond the rapidly developing litigation front, the National Basketball Association and American Basketball Association are seeking an explicit congressional exemption for their proposed merger. Although

8. 15 U.S.C. § 1291 (1970). Approval of the merger may, or may not, be taken as approval of the arrangements described in the text.

9. 1970 Trade Cas. 73,282 (S.D.N.Y. 1970).

10. 1971 Trade Cas. 73,536 (D.C. Cal. 1971).

there may be non-labor reasons for seeking a merger, both leagues have indicated their belief that a merger is necessary to end the "bidding war" for rookies by establishing a common draft and instituting mandatory compensation arrangements to govern the signing of free agents.¹¹ Senator Ervin has called for a full scale review of the antitrust issue and has sponsored legislation explicitly applying the Sherman Act to professional sports.¹² Although such legislation might affect many practices in the industry, Senator Ervin has made it clear that its principal impact would be to restrict the ability of the owners to allocate players among teams through collusive means.

Looking at these issues strictly in antitrust terms, a horizontal merger of all the "firms" in an industry or an agreement between them to deal with others only on specified terms would raise serious antitrust questions. While there may be some reason to treat a group of teams—"a league"—as a "firm," there seems little reason to permit a horizontal merger or cartel arrangement, *i.e.*, group boycott, among them all. Relatively evenly matched teams may increase fan interest, and concerted action allocating players within "leagues" may be essential to consumer satisfaction and the success of the overall enterprise. Many thus attribute the lack of success of the football All-American Conference to the fact that no other team could beat the Cleveland Browns. Allocation of players in the interest of even contests is thought by some to be an "efficiency," therefore, and no more a violation of the antitrust laws than the formation of a law firm by previously independent practitioners. In both cases, the concerted action produces efficiencies which arguably outweigh whatever restraints on competition are involved, and the presence of these efficiencies is indicated in a shorthand way by calling each league what we call law partnerships, a "firm."¹³ A merger of these "firms" is harder to justify, however, for there is less reason to think that competition for players *between* leagues is inconsistent with evenly matched contests *within* them or that there will not be a sufficient number of good players in each league. Fan interest may be stimulated whether or not

11. See statements of Jack Dolph, Commissioner, American Basketball Association; Walter Kennedy, Commissioner, National Basketball Association; and Thomas H. Kuchel, before the Subcommittee on Antitrust and Monopoly Legislation of the United States Senate Committee on the Judiciary, Nov. 15, 1971 (on file with the *Yale Law Journal*).

12. S. 2616, 92d Cong., 1st Sess. (1971). It provides in part that "the business of providing for profit public games or contests between any team of professional players shall not be exempt from the [Sherman Act]."

13. See Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 and 2), 74 *YALE L.J.* 775 (1965), 75 *YALE L.J.* 373 (1966).

individual leagues are joined in financial wedlock. If that is the case, the impact of a merger would be anti-competitive and antitrust principles would seem to bar it.

Although these questions remain open, we see no reason to take issue with Senator Ervin's general view that professional sports present no special case for exemption from the antitrust laws and, putting aside considerations relating to *stare decisis*, we would welcome the overruling of *Toolson*. Notwithstanding this area of agreement, however, we take a radically different view of the merits of challenges by *players* to reserve or option clauses. For us, the antitrust issue is a straw man, deserving the space we devote to it only because so many eminent persons, including some who have much to lose, mistake straw for flesh and blood. Both the dispute over the basketball merger and the debate over the merits of individual challenges to the reserve clause have taken insufficient account of a recent development with far reaching consequences. The terms and conditions of employment of professional athletes in baseball, basketball and football are no longer governed solely by individual contracts but have been supplanted in part by collective bargaining between the leagues and player unions. As a result, national labor policy, rather than antitrust law, is the principal and pre-eminent legal force shaping employment relationships in professional sports.

The antitrust battle being waged in Congress and in the Supreme Court by the leagues and their players is a case of the right teams playing the wrong game in the wrong arena. Once a collective bargaining relationship exists between professional athletes and their leagues, Flood's lawsuit and legislative proposals of similar intent constitute challenges not, as critics of the club owners charge, to a system of peonage, but to two fundamental principles of collective bargaining as it has developed in the United States: the exclusive power of the bargaining agent and freedom of contract between employer and union. The "right" to exercise individual bargaining power without restraint, which Flood claims, is explicitly denied to employees with a bargaining representative validly recognized under the National Labor Relations Act. Furthermore, the reserve clause in baseball and the common draft in basketball raise questions, not of group boycott or merger law, but of the scope of the duty to bargain and of freedom of contract between parties to collective bargaining. To us, therefore, the question is no longer whether professional sports are entitled to a special exemption from the antitrust laws where their employment relationships are involved, but whether unions of professional athletes

are entitled to special help from the courts and Congress in bargaining with their employers.

II. The Governing Principles of Labor Law

A. *The Professional Athlete and His Bargaining Representative*

At stake in the *Flood* litigation and the basketball merger is the power of the clubowners to agree not to compete for the services of individual players. Flood seeks to exercise his individual bargaining power free of collusive arrangements by others. This is also the goal of those players who oppose the basketball merger or petition Congress for legislative help: to force individual teams (or leagues) to compete for their services so that their individual bargaining power is increased. This is an appealing claim, for it combines notions of individual liberty with traditional views about rewarding the talented. This goal, however, is of much greater importance to the stars than to the journeymen, for the unique qualities of the former make for great individual bargaining power.

However much legal merit such claims have in the absence of collective bargaining, it is a first principle of the National Labor Relations Act that employees in a bargaining unit lose their "right" to bargain individually when a majority vote to be represented by a union. For under Section 9 of that Act, the elected representative becomes the exclusive representative¹⁴ for purposes of collective bargaining and individuals seeking to exercise control over their employment destinies must work through the union. To be sure, the concept of an exclusive representative is not essential to collective bargaining. In some countries, collective bargaining systems do in fact operate on a members-only basis, with unions representing only those workers who adhere to the organization. Nevertheless, the concept is central to the institution as it has developed in the United States and to the legal structure which supports it.

A full explanation for the adoption of the exclusive representative system in this country—a fear of company unions, considerations of efficiency in bargaining, etc.—is unnecessary, for there is an explanation which speaks directly to the case of the talented athlete. As Mr. Justice Brennan put it:

14. 29 U.S.C. § 159(a) (1964).

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer¹⁵

Forbidding the exercise of individual bargaining is thus a means of strengthening the collectivity. It deprives employers of the divide and conquer tactic of bargaining individually with their employees and increases the bargaining power of the collectivity by including the most talented employees in the group for which the bargain is made. If the most skilled workers were able to opt out of the collectivity, the employer would be under less compulsion to make generous settlements with the union.

Because the exercise of individual bargaining power is extinguished, it is a fact of industrial life that the talented individual may fare less well in collective bargaining than he would if he bargained on his own. One of the first things many industrial unions seek is the elimination of differentials paid for the "same work," the "same work" being defined in terms of rough similarity of job rather than identical efficiency in production.¹⁶ Unions may also tend to narrow differentials between skilled and unskilled jobs by bargaining for roughly the same increases in absolute terms.¹⁷ Over time this diminishes relative differentials and may be one reason why the question of craft severance is a much litigated issue before the National Labor Relations Board.¹⁸ Where employers agree to hire only through union hiring halls, highly skilled workers may be excluded from an entire industry because a union fearful of unemployment may not admit them to the halls.¹⁹ Consider, finally, the typical seniority clause, which may dictate the order of layoffs solely according to length of time employed in the seniority unit. In each of these examples, productivity is likely to vary

15. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

16. Where the union does not eliminate differentials, it generally establishes a fixed range. L. REYNOLDS & C. TAFT, *THE EVOLUTION OF WAGE STRUCTURE* 171-72 (1956).

17. *Id.* at 185.

18. See *National Tube Co.*, 76 N.L.R.B. 1199 (1948), *overruled by* *American Potash & Chem. Corp.*, 107 N.L.R.B. 1418 (1954), *overruled by* *Malinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966).

19. A. REES, *THE ECONOMICS OF TRADE UNIONS* 127-28 (1962). Workers may also be admitted but consigned to work priority groups. LABOR-MANAGEMENT SERVICES ADMINISTRATION, U.S. DEP'T OF LABOR, *EXCLUSIVE UNION WORK REFERRAL SYSTEMS IN THE BUILDING TRADES* 57 (1970).

enormously among workers but the collective agreement does not permit it to be taken into account. While each of these practices may well be thought to be for the benefit of the majority, it cannot be doubted that in many cases a more talented worker would fare better if he were permitted to opt for individual bargaining. The National Labor Relations Act, however, compels the individual sacrifice for the good of the whole. As the Supreme Court was at pains to point out in *J.I. Case v. NLRB*:

The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous.²⁰

There is no reason whatsoever to think that unions of professional athletes ought to be treated differently; indeed, the above seems particularly applicable to them. If the stars in a sport can opt out of the bargaining unit, the remnant union, consisting entirely of journeymen, will be weak indeed. It is far from clear that any substantial concessions on salaries or pensions can be extracted by a union of marginal players, if the stars are either individually or through another union making their own deal. It is even doubtful whether a union of marginal players can exist. The existence of unions in professional sports thus negates any possibility of individual bargaining except as permitted by the collective bargain. This is not to say that the stars in a sport are worse off belonging to a union than they are bargaining individually with a cartel of their potential employers. But it is to say that many, if not most, of the benefits—*e.g.*, minimum salaries, travel allowances—achieved by inclusion of the stars will largely benefit marginal players and, further, that the claims of individual “rights” made by Flood to the courts and others to Congress are wholly and utterly inconsistent with the existence of an exclusive bargaining representative. Peonage it may be, but it is a peonage imposed by national labor policy.

Two important qualifications must be added, however. First, while the concept of an exclusive bargaining representative forecloses individual bargaining at the option of individual employees, it does not

20. 321 U.S. 332, 339 (1944).

foreclose the collective bargain from leaving certain issues to be resolved by individual bargaining.²¹ There is nothing in the National Labor Relations Act which rules out arrangements of the type Flood and the other players want. The Act merely dictates the process by which they are to be reached. Second, the exclusive bargaining representative may not reach any agreement it pleases without regard to its impact upon members of the bargaining unit. From the statutory grant of exclusive bargaining power has sprung a duty, in *Steele v. Louisville & N. R.R.*,²² to represent all members of the bargaining unit fairly. Whether acquiescence in reserve or option clauses by a union of athletes violates that duty turns in part on the peculiar nature of collective bargaining by professional athletes, and so the question of fair representation will be taken up after consideration of the role of the reserve or option clauses in that bargaining.²³

B. *Reserve or Option Clauses and Freedom of Contract*

The reserve or option clause issue is central to the employment relationship in professional sports. In the absence of collective bargaining, such clauses are unilaterally imposed by an employer cartel. After collective bargaining is introduced, however, they must be viewed as an integral part of a bargain—perhaps a “bad” or “unfair” bargain, but a bargain nevertheless. For this reason, the reserve clause issue intersects with yet a second fundamental principle of collective bargaining: freedom of contract.

We, as well as others, think it is obvious that reserve or option clauses are mandatory subjects of bargaining under the National Labor Relations Act.²⁴ Under the Act, unions and employers are required to bargain in good faith about “wages, hours and other terms and conditions of employment.”²⁵ This phrase has been given an expansive reading by the Supreme Court and has been said to include, among other more obvious subjects, pension plans,²⁶ contracting out of work,²⁷ and elimination of jobs.²⁸ We find it difficult to construct even a hypothetical argument that a contractual provision so intimately con-

21. *Id.* at 338.

22. 323 U.S. 192 (1944).

23. See pp. 18-21 *infra*.

24. It is our understanding that no party to the *Flood* litigation or responsible individual in professional sports disputes this contention.

25. 29 U.S.C. § 158(d) (1964).

26. *Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1948).

27. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

28. *Order of Railroad Telegraphers v. Chicago N.W. R.R.*, 362 U.S. 330 (1960).

nected with determining the team for which an athlete will play and what salary and other benefits he may extract through individual bargaining is not a term and condition of employment. The reserve or option clause is at the heart of the collective bargaining relationship and an issue which must be resolved if bargaining is to mature. Whether maximum salaries, or only minimum, are to be specified by the agreement and how, in the absence of maxima, individual salaries are to be determined, is at stake. Furthermore, the amount of salary which will be paid under individual bargains plainly affects all other provisions of the collective agreement which impose monetary costs on the clubs. Finally, the reserve or option clause problem raises other questions, such as maintaining evenly matched teams. It is no overstatement to say that at the present time these clauses are *the* bargaining issue between club owners and player unions.

Because it is a mandatory subject of bargaining, the club owners must discuss the issue in good faith when the players raise it.²⁹ Freedom of contract, however, is the general rule. Decision after decision of the Supreme Court,³⁰ as well as the quite explicit language of the National Labor Relations Act,³¹ make it unmistakably clear that no obligation to make concessions or reach an agreement is imposed by the Act and that collective bargaining is to be generally free of governmental interference in the writing of substantive contract terms. So long as a party discusses the issues in good faith and, in the words of Judge Magruder, makes "*some* reasonable effort in *some* direction to compose his differences" with the other party, the obligations imposed by the statute are fulfilled.³² A party may, therefore, freely insist that particular provisions be included in the collective agreement and use all the economic force he can muster to enforce his demands. This is so no matter how unfair or unreasonable the provisions may seem to others or how little is offered in exchange for them.

This approach, a cornerstone of national labor policy, may well seem overly to favor the strong over the weak. But it is based on sound considerations which call for rejection of any attempts to bring about government intervention in bargaining in professional sports. For even if the strong are helped by government abstention, there is no

29. NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

30. See, e.g., H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970).

31. 29 U.S.C. § 158(d) (1964) provides in part: "[The duty to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession."

32. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953) (emphasis in the original), cert. denied, 346 U.S. 887 (1953).

reason to think either that the proper way to redress the balance of power is to rewrite individual collective agreements, or that courts are the proper institution to do the rewriting. There are, in fact, a wide range of alternative methods by which the power of employers or unions can be increased or diminished,³³ alternatives which respect the affirmative reasons supporting non-intervention by the government in the bargaining process.

One such affirmative reason is the sound belief that the parties know what is best for them.³⁴ The fact that governmental intervention in the substantive terms of a collective contract must be from a distance increases the danger of imposing terms which are in the long run ill-suited to the peculiar circumstances of the bargaining relationship. All our experience with collective bargaining suggests the difficulty of generalizing about the desirability of various contract provisions in different industries and even in different firms within a single industry.³⁵ This reason seems peculiarly apt in the case of professional sports. Collective bargaining in sports is not the mature institution it is in other industries, and however much dissatisfaction there may be with restrictions like reserve or option clauses, there is virtually no agreement even among their critics as to what ought to replace them. To do there what government has declined to do in more familiar industrial contexts seems the height of folly. The Supreme Court has recently declined to impose simple checkoff agreements on employers.³⁶ Should it now impose a solution to the most complicated and controversial issue outstanding between professional sports and player unions?

A second affirmative reason supporting freedom of contract, the belief that free collective bargaining leads to industrial peace,³⁷ also has force in the context of professional sports. Because the parties are forced to explain their positions and discuss their differences, mutual understanding is fostered and areas of possible compromise exposed. By not intervening in the fashioning of substantive contract terms, the government enhances the possibilities of compromise by maximizing the number of *quids* and *quos*. Interventionists tend to

33. Restrictions on picketing, the right to strike, market-wide union organization, the use of replacements, or lockouts, for example, all affect the balance of power between employers and unions.

34. See H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 49 *et seq.* (1968).

35. See Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

36. See note 30 *supra*.

37. See H. WELLINGTON, *supra* note 34.

forget that depriving a party of a particular bargaining demand necessarily changes more than his stance on that one issue. A strong negotiating position will remain strong even if the government outlaws a particular demand, because bargaining power can be shifted to other issues. Denying a demand to a party may thus increase the chances of a strike because it lessens the area of possible compromise without affecting the underlying strength of the parties. If reserve and option clauses are outlawed, the stance of the club owners on minimum salaries, pensions, playing surfaces, schedules, arbitration of grievances, etc., must be affected. Compromises on these other issues may in turn be impeded and strikes encouraged. For though the elimination of the reserve clause will help one faction in the union, the response of the owners on other issues may injure a different faction.

This is so even if the owners cannot fully recoup what they would lose if the reserve clause were outlawed. It may well be that denying access to such provisions will increase their total wage bill because there is no compensating concession to be extracted from the players' union. Nevertheless, the owners will seek to recoup what they can and the demands they make to that end may be more disruptive and inflammatory than the reserve clause itself.

In any event, there are many other kinds of contract provisions which would limit the amounts stars can extract through individual bargaining. We see no reason why the club owners cannot demand a maximum salary provision, for example. The probability of strikes may be enhanced by legal intervention which forces the owners to turn to such alternative proposals which many players—including the stars—will find less palatable in the long run than the reserve clause.

Although this is not a brief for reserve or option clauses nor a prediction that outlawing such clauses will cause strikes, it is very much a brief for the position that if professional athletes are to have the right to engage in collective bargaining and to strike, then the normal principles of labor law should apply. It may well be that the long history of collusive behavior enforcing the reserve clause in baseball calls for a close look at the seriousness of the owners' bargaining over this issue. But that is not to say that concessions are obligatory or that any action other than an unfair labor practice proceeding is appropriate. Long history or no, the club owners are now legally obligated to bargain collectively over all terms and conditions of employment and the players have the right to strike. The *Toolson* error in not applying the Sherman Act will not be corrected by an error in not applying the Taft-Hartley Act.

1. *The Baseball Hang-Up Provision and the Flood Case*

While conceding that principles of labor law ought to be applicable to the sports industry generally, some may argue that the present status of the reserve clause in baseball's collective agreements requires that principles of labor law not be applied in *Flood*. After Flood initiated his action, the clubowners ceased to bargain about the reserve system with the players' union. In response, the union refused to incorporate any direct reference to it in the agreement. In order, however, to negotiate on those matters on which agreement could be reached, the parties adopted a "hang-up" provision which stipulated that neither party would be required to bargain over the reserve system until the *Flood* suit was terminated. The 1970 agreement did not, therefore, incorporate the reserve system although the system continued to govern the relations of the parties.

A question thus arises as to whether the above-mentioned principles of labor law apply when the parties have left the reserve system in a legal, if not practical, limbo as far as the collective agreement is concerned. Of course they do, for the whole import of what we have argued is that collective bargaining is the prescribed, exclusive method of settling such issues under the National Labor Relations Act once an exclusive bargaining agent has been legally recognized. To be sure, if the reserve clause is prohibited by the antitrust laws in spite of the labor laws (a question to which we later turn), the courts must act, but that is not to say a union and employer may agree to disagree and have the courts rule on the legality of a disputed issue as though there were no federally regulated bargaining relationship. If the establishment of collective bargaining extinguishes antitrust claims, no stipulation of the parties to cease bargaining about an issue can make it a justiciable antitrust problem. If the claims survive, on the other hand, no agreement of the parties can extinguish them. If the situation were otherwise, we would not only witness the courts unconstitutionally deciding what are essentially hypothetical cases—as well as rendering decisions on the merits which can be overridden at any time by a collective agreement—but collective bargaining would be complicated by yet another issue to be negotiated: whether to leave disputed issues to the courts.

2. *The Basketball Common Draft and Merger*

The application of labor law principles to the proposed common draft in basketball raises somewhat different problems. Each league

presently bargains with a union representing its players. There are, therefore, separate bargaining units and questions arise as to the relationship of labor law to the proposed common draft. May the leagues bargain individually with the two player associations for a common draft even if the leagues maintain their separate identities, or is a merger necessary? May a union and employer agree upon the method by which persons outside the bargaining unit, *e.g.*, graduating college seniors, can enter it?

A strong case can be made for the proposition that the leagues may retain their separate entities and bargain with the players' unions for a common draft. Although it is a refusal to bargain for an employer to insist that competing units be organized before he will bargain with a union representing his employees,³⁸ it does not follow that the employer may not bargain with one union for contract provisions affecting others. Bargaining need not be stayed pending organization of all competing units since an employer is free to point out and insist that he cannot afford increased costs because of competition from unorganized employers—or employers organized by a different union for that matter. The parties may, in short—indeed, must, if they are to bargain rationally—take competing units into account in bargaining.

In *Fibreboard Paper Products Corp. v. NLRB*³⁹ the Supreme Court rejected an employer's argument that he might refuse to bargain about the "contracting out" of work from a bargaining unit. Because of the intimate relationship between the contracting out and the terms and conditions of employment in the original unit, the Court held that it was a mandatory subject of bargaining. The fact that bargaining over the subject directly affected a group of employees outside the unit was not a sufficient reason for the employer to act unilaterally. Indeed, the very fact that the two bargaining units were in direct competition for the same work was critical to the decision.⁴⁰

But for the fact that the employees benefit and the employers suffer from the competition, rather than the other way around, the common draft proposal seems to raise the precise question answered in *Fibreboard*. The method by which players are allocated between bargaining units bears an extremely close relationship to the terms and conditions

38. See, *e.g.*, *American Barge Lines, Inc.*, 13 N.L.R.B. 139, 147 (1939).

39. 379 U.S. 203 (1964).

40. *Id.* at 213-14. To be sure, a union and an employer may not agree that the union impose certain terms and conditions of employment upon other units with a view to driving these other units out of the product market. *UMW v. Pennington*, 381 U.S. 657 (1965). See pp. 25-26 *infra*.

of employment in those units (common draft case), just as the method by which work is allocated between units bears an extremely close relationship to the terms and conditions of employment in the original unit (contracting out). The difference is only that two employers are in direct competition for the same athletic services rather than two groups of employees being in competition for the same work. Because collective agreements in sports provide only for minimum salaries and call for individual bargaining, negotiations over provisions allocating players seem a natural and logical step, as suitable for collective bargaining as contracting out in the industrial context. Both the policy of letting the parties work out their own arrangements and of maximizing the possible *quids* and *quos* so as to encourage compromise lead to this result.⁴¹

It should be emphasized that even if the common draft is not a mandatory subject of bargaining, the governing principles are still principles of labor law. For example, the players may argue that insistence on a common draft is more analogous to refusing to bargain until competing units are organized than it is to the *Fibreboard* decision. If so, it would be a refusal to bargain by the club owners for which the National Labor Relations Act provides a remedy.⁴²

A final issue needs to be mentioned. A player draft controls not only those in the bargaining unit but the method by which those outside enter it. Some may argue that such an issue is not subject to resolution by collective bargaining. We submit that it is and that many precedents in the industrial context support this conclusion. The method by which new players enter has an enormous effect on those already in the unit and the collective agreement which governs them. Revenues spent on new entrants are not available for uses the union might prefer. Employers in industry must bargain about subcontracting, or at least its effect on the unit, and this is bargaining over the extent to which persons outside the unit will do the work of the unit and reduce revenues available to those in it. Exclusive hiring hall agreements in effect require those seeking employment to gain entry into the union hiring hall before gaining employment. And, last but not least, almost all wage agreements stipulate the wage at which new entrants must come into the unit.

41. See pp. 12-13 *supra*.

42. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

III. The Legality of Reserve or Option Clauses

The reserve clause (and, a fortiori, the option clause) thus seems on its face a contractual arrangement sanctioned by collective bargaining. The protection conferred by the exclusive powers of the bargaining representative and the policy of freedom of contract, however, do not extend to provisions which violate either the fiduciary responsibilities of the bargaining agent or some other established policy. Three potential lines of attack seem worthy of discussion: policies against unreasonable employment contracts, the duty of fair representation, and the antitrust laws.

A. *The Reserve Clause as an Unreasonable Employment Contract*

We turn first to the question of whether, apart from the collusive means, *i.e.* group boycott, by which they are imposed on the players, reserve or option clauses—either in the form of perpetual “ownership” of athletic services or of a mandatory compensation requirement when a free agent signs with another team—are such that they violate public policies looking to relieve individuals of unreasonable restraints on their freedom to seek employment. This issue sometimes appears as a restraint of trade issue and some such notion underlies Flood’s claim that the reserve clause constitutes peonage as a matter of law. It might also be analogized to covenants not to compete which, when imposed on employees, have been held illegal unless reasonable in time, activity and area.⁴³

First, our strong impression is that the center of gravity of the criticism of reserve or option clauses is not so much the dislike of long-term contracts as the desire to get more in return for them. Furthermore, such restraints are not uncommon to collective bargaining. Where employers agree to hire only through union hiring halls, the employee must as a practical matter go to the employer to which he is assigned by the union. It is well-known that the hiring hall is a device which permits unions to exclude large numbers of persons from employment in entire industries. One cannot expect, for instance, to move to a new city and be admitted to the union hiring hall of his trade, even though he has for a lifetime been a member of the international union. Once again, if there are policies lurking around which invalidate the reserve clause, they are also policies which cut a wide swath through collective bargaining as we know it.

43. See 5 S. WILLISTON, *CONTRACTS* § 1643 (2d ed. 1937).

But most important, the reserve or option clause, where a collective bargaining relationship exists, is not analogous to unlimited covenants not to compete. The reserve clause—the most restrictive in sports—is *not, as a legal matter, a firm long-term restriction*. If the clause is in the individual player agreement, it can be superseded at any time by a collective agreement. And because it is a mandatory subject of bargaining, the club owners are required by law to discuss the players' proposals on the issue at the expiration of every collective agreement, the players being free to strike to enforce their demands. In short, whether contained in the league rules, individual player contracts or in the collective agreement, for all practical purposes *the reserve clause expires with the collective agreement*.

B. *The Reserve Clause and The Duty of Fair Representation*

In describing the duty of fair representation, the Supreme Court has said:

Under this [*Steele*] doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.⁴⁴

Quite obviously, this duty does not compel a union to press for the individual objectives of each of its members or, when the interests of various groups within the unit conflict, to eschew choice among them. Nor does it prevent the establishment of arbitrary rules, where the arbitrariness is arguably in aid of a valid goal of the majority, *e.g.*, limiting the discretion of an employer. What it does is prohibit discrimination unrelated to industrial (or athletic) considerations. The classic case of unfair representation is denying the benefits of bargaining to, or using bargaining power to injure, a group because of its race. Presumably, distinctions based solely on political affiliation, ethnic background, sex, or the personal spite of the union establishment would also be condemned. But the law has been tolerant of contractual arrangements which, in the face of conflicting interests within the union, benefit one group of workers at the expense of others. In *Britt v. Trailmobile Co.*,⁴⁵ for example, the employer and

44. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

45. 179 F.2d 569 (6th Cir. 1950), *cert. denied*, 340 U.S. 820 (1950).

union were faced with the problem of adding to the seniority list the employees of a recently acquired firm. By agreement, seniority was said to start from the first day in the plant, a solution which put all the employees of the acquired firm at the bottom of the list. The agreement was upheld. One might well quarrel with this decision on the grounds that it seems a small intrusion on the bargaining process to compel a dovetailing of the two lists (date of hire with either firm) rather than permitting the majority completely to disregard the interests of the minority. There were, moreover, no other interests at stake since industrial efficiency would not have been affected by imposing what seems the fairer alternative. The employer would seem equally amenable to either solution.

This, we submit, overlooks the complexities of the matter. A goal of unionism is to restrict the discretion of the employer. One way of accomplishing this is to impose fixed rules of relatively easy application. Such rules are of necessity arbitrary because their very purpose is to limit drastically the range of considerations the employer may take into account. The larger the range of considerations which may permissibly enter into any decision calculus, the more discretion is left to the decision maker, thus diminishing the control that can be exercised over him. The bilateral control contemplated by collective bargaining requires that many decisions be subject to some form of negotiated control by the union. Direct union participation in every decision would accomplish this, but that is usually impractical because it is wildly inefficient and, unless the union has such complete control over the decision that no one dare challenge it—the hiring hall comes to mind—continual participation is an invitation to civil war and chaos within the union. The other, and more common, alternative is the fixed, arbitrary rule, like the seniority clause.

In turn, however, this need for arbitrariness drastically limits the extent to which a tribunal can intervene in the name of fair representation, in the absence of what is virtually a gratuitously discriminatory use of bargaining power. Again consider seniority. Although its familiarity leads us to take it for granted, it is both arbitrary and discriminatory. Length of time within the seniority unit has no necessary connection with experience, efficiency or anything else. Seniority has become commonplace because it is handy and simple. More important, it is politically palatable within the union because it discriminates in favor of the majority, those who have been on the job for some time, and against the minority, new or future hires. If we agree that seniority arrangements are nevertheless permissible, then

the use of seniority in *Trailmobile* ought to be regarded more as an act of poor sportsmanship than a violation of the duty of fair representation. Some employees were going to lose seniority no matter what arrangement was chosen, and there is no "fair" solution in terms of any discernible norm or pre-existing standard. Dovetailing, after all, usually will arbitrarily give an advantage to the employees of the older firm. What seems wrong with the solution chosen was that the politically powerless were made to bear the entire loss. However, all seniority clauses bear most heavily on the powerless, such as new or future hires, and to reject the *Trailmobile* solution would involve the courts not in the fashioning of fair settlements but in rejecting the union's political processes and bargaining as the proper procedure to settle the issue. Such a ruling would thus come close to a rejection of collective bargaining itself.

We take this excursion not because we believe reserve or option clauses to be fully analogous to seniority, but because we believe this everyday example illuminates the scope of the duty of fair representation. Moreover, we believe the reserve clause to be an a fortiori case in light of it. The shape of the typical seniority clause is often irrelevant to the employer and resolved simply by a test of strength within the union. The reserve clause, or some kind of restriction on the movement of players from team to team, on the other hand, is believed by many to be essential to the economic health of the sport. A fortiori, therefore, it seems more justifiable than the typical seniority provision. Few, even among those most opposed to the reserve clause, would contend that all long-term contracts ought to be illegal in sports. What many seek is a middle ground, in some cases a middle ground not far from the clause itself. What is the best solution, however, is not the issue under the duty of fair representation; that is left to collective bargaining. The issue is whether invidious discrimination is present.

But consider baseball. Among the matters governed by collective agreements are maximum salary cuts, travel expenses, minimum salaries, provisions for health care, and pensions. There are, however, no provisions establishing maximum salaries. It is hardly surprising that the club owners insist on some provision regulating the allocation of players among clubs, some provision to introduce some certainty as to how much value in player talent each club owns and how much in salary may be extracted by the more talented ballplayers. To be sure, the reserve clause in precise terms is not the only possible arrangement, but for purposes of testing its validity under the duty of fair representation, it is enough to say that all alternative arrangements will also

discriminate against the more talented players. Indeed, many of these alternatives seem even less favorable to the better athletes than the reserve clause. If minimum salaries can be negotiated, so too can maximum salaries. But if maximum salaries are held to be illegal in baseball because they discriminate against the best players, then they should also be illegal in the steel industry because they discriminate against the best steelworkers. It is elitist to view industrial workers as fungible and to treat them as though there are no differences in efficiency. Collective arrangements there can be as discriminatory as in sports, for it is in the nature of collective bargaining that the most productive members of the union may get less for the sake of the collectivity.

C. The Reserve Clause and the Antitrust Laws

Flood's allegations fit a classic antitrust mould. All the buyers to whom he can sell his services have agreed not to purchase these services except on certain terms. If the efficiencies produced by the arrangement (stability of terms, evenly matched contests, and so on) do not outweigh the restrictive effects, such an agreement would plainly be labeled a cartel or price fix, a per se violation of the antitrust laws.⁴⁶

There is, however, no reason to think that as between employers and employees engaged in collective bargaining the antitrust laws either have or ought to have any application whatsoever to the determination of terms and conditions of employment. When the players' unions submit demands to the club owners, the players are themselves engaged in collusive conduct (all the sellers agree not to sell their services except . . .), albeit collusion fostered by law.⁴⁷ Similarly, when a group of employers compelled by law to bargain with a union confer together and submit identical proposals, their conduct seems such that

46. The assertion that cartels or price fixes are per se illegal is deceptively clear-cut, for the question of what is a cartel or price fix is essentially judgmental. There are all kinds of commonplace economic arrangements which fix prices and divide markets, and yet are legal, for example, law partnerships. Without going into detail, the rule may be better stated as a per se prohibition on agreements which do not produce net efficiencies, which is to say that once the restrictive effect is shown to outweigh the efficiencies, a court will not inquire into the reasonableness of the restriction, for example, whether the price fixed is a reasonable one.

47. A union is a horizontal agreement between competitors to fix the prices (wages) at which they will work. It is not fashionable to call unions cartels, because the term is thought to be derogatory. But if the term is to have any analytic content, it must encompass labor unions, for their express purpose is to eliminate competition among particular workers.

only the existence of collective bargaining protects them from an anti-trust challenge.⁴⁸

Collective bargaining seeks to order labor markets through a system of countervailing power.⁴⁹ Thus it is often referred to by economists as bilateral monopoly.⁵⁰ If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished.

It is commonplace for employers to bargain as a group rather than singly and the Supreme Court has explicitly declared multi-employer bargaining to be authorized by the National Labor Relations Act.⁵¹ This makes a shambles of Flood's claims that the reserve clause is imposed by anti-competitive means. What differentiates the reserve clause from other contractual arrangements is the fact that the alternatives which competitors might offer are foreclosed by collusion. But the collusion—joint employer proposals—is part and parcel of collective bargaining in the United States. Flood's arguments, if accepted, would have absurd practical effects. For example, when the steel firms make a joint wage offer to the United Steelworkers, an employee dissatisfied with the offer might, if the claims pressed in *Flood* are right, sue the companies for engaging in a price fix.

Such results are unthinkable unless collective bargaining is to be radically restructured. To bring about such results through *Flood*, however, would border on the irresponsible. It has been litigated with the implications for the institution of collective bargaining only dimly perceived. The labor law issues have been in the corners of the case—the courts below, for example, did not reach them—moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel. Many unionized industries—perhaps all—would be affected by a sweeping decision, but those affected are totally unaware that important issues of labor law are before the Court.

An examination of the modern decisions of the Supreme Court on the labor antitrust question, moreover, reveals not the slightest hint that such a momentous decision—permitting individual members of a bargaining unit to sue employers because they have jointly made an

48. Cf. *NLRB v. Truck Drivers' Union*, 353 U.S. 87 (1957).

49. J. GALBRAITH, *AMERICAN CAPITALISM* 137 *et seq.* (1952).

50. A. CARTER, *THEORY OF WAGES AND EMPLOYMENT* 80-81 (1959); G. STIGLER, *THE THEORY OF PRICE* 207-08 (3d ed. 1966).

51. *NLRB v. Truck Drivers' Union*, 353 U.S. 87 (1957).

offer—lurks somewhere in the Sherman Act.⁵² In 1941, the decision in *United States v. Hutcheson*,⁵³ by holding that union conduct is generally immune from antitrust sanctions, brought to an end an era in which the Sherman Act was a powerful restraint on union power. Since then, three major decisions have attempted to fashion a theory defining the scope of the immunity for collective bargaining activities more precisely, a theory which, we believe, plainly immunizes reserve or option clauses from suits by players.

In *Allen-Bradley Co. v. Local 3, IBEW*,⁵⁴ the union, having jurisdiction only over metropolitan New York City, organized the employees of most of the electrical equipment manufacturers and contractors in the area. Under the collective agreements, the contractors agreed to buy electrical equipment only from manufacturers in contractual relations with Local 3, *i.e.*, only those in New York City, while the manufacturers agreed to sell only to those area contractors who employed members of Local 3. Non-union operations were prevented by the usual tactics of picketing and the like. Sheltered from competition, the parties to this arrangement prospered.

Some excluded manufacturers brought an antitrust action against Local 3. “Quite obviously,” said the Court through Mr. Justice Black, “this combination of businessmen [the New York electrical manufacturers and contractors] has violated . . . the Sherman Act, unless its conduct is immunized by the participation of the union.”⁵⁵ He concluded:

There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.⁵⁶

Unions violate the Sherman Act, therefore, when they “aid non-labor groups to create business monopolies,”⁵⁷ and “the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups.”⁵⁸

52. For a review of the labor-antitrust issue in the Supreme Court, see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

53. 312 U.S. 219 (1941).

54. 325 U.S. 797 (1945).

55. *Id.* at 800.

56. *Id.* at 811.

57. *Id.* at 808.

58. *Id.* at 810.

In *Amalgamated Meat Cutters v. Jewel Tea*,⁵⁹ multi-employer, multi-union negotiations led to an agreement containing the following restriction on the operating hours of food store meat departments:

Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.⁶⁰

Jewel Tea had objected to the provision throughout the negotiations but, under the duress of a strike vote by the union, it signed. It then brought suit against the union under the Sherman Act. Jewel Tea argued that the provision in question was an attempt by its competitors to prevent the night time, pre-packaged, self-service meat vending for which it was equipped. The Court, in opinions by Justices White and Goldberg, three Justices dissenting, upheld the union's contention that the agreement was immune from antitrust sanctions.

Justice White ruled that the proper test of antitrust immunity was to balance the labor policies at stake in the collective agreement against the antitrust policies threatened by the specific provision. Important in Justice White's calculus was the fact that the marketing hours provision was a subject "well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain,"⁶¹ and that the provision was of "immediate and direct"⁶² concern to union members. He concluded:

If it were true that self-service markets could actually operate without butchers, at least for a few hours after 6 p.m., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased, Jewel's position would have considerable merit. For then the obvious restraint on the product market—the exclusion of self-service stores from the evening market for meat—would stand alone, unmitigated and unjustified by the vital interests of the union butchers In such event the limitation imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act

Thus the dispute between Jewel and the unions essentially concerns a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible?

59. 381 U.S. 676 (1965).

60. *Id.* at 679-80.

61. *Id.* at 691.

62. *Id.*

The District Court resolved this factual dispute in favor of the unions.⁶³

Mr. Justice Goldberg fashioned a far different test. Since negotiating parties are under a legal duty to bargain about mandatory subjects of bargaining (the provision in question being such a subject), he argued, all such subjects should be exempt from the antitrust laws. After a detailed review of judicial efforts to apply the Sherman Act to labor and of the legislative history of the NLRA, Justice Goldberg concluded that

[t]he National Labor Relations Act . . . declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.⁶⁴

Three Justices, in an opinion by Mr. Justice Douglas, dissented on the grounds that the case clearly fell within the *Allen-Bradley* rule.⁶⁵

Finally, in *United Mine Workers v. Pennington*,⁶⁶ the Court considered allegations that the Mine Workers had agreed with the larger companies in the industry upon a scheme to end "overproduction." Their goal was to eliminate the smaller companies by encouraging mechanization in the large mines and increasing wages along with productivity. The increased wages, however, were to be imposed upon all firms in the industry, whether mechanized or not, with the result that the smaller, marginal companies would go out of business. Mr. Justice White's opinion, concurred in by three Justices, said that such allegations, if proved, would show a violation of the Sherman Act on the grounds that

[o]ne group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even

63. *Id.* at 692-94.

64. *Id.* at 711-12.

65. *Id.* at 735-38.

66. 381 U.S. 657 (1965).

though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers⁶⁷

The Justices who dissented in *Jewel Tea* concurred, again on the grounds that the case fell squarely within *Allen-Bradley*.⁶⁸ Mr. Justice Goldberg dissented, arguing once more that mandatory subjects of bargaining, when agreed upon by the parties, cannot give rise to antitrust sanctions. He contended that "[i]f a union and employer are prevented from discussing and agreeing upon issues which are, in the great majority of cases, at the central core of bargaining, unilateral force will inevitably be substituted for rational discussion and agreement."⁶⁹

Each of these cases involved the antitrust liability, or labor law exemption, of employers as well as unions for activities engaged in as a result of collective bargaining. Yet not one opinion of a single Justice contained even a hint of encouragement for the kind of claim pressed in *Flood*. Quite the contrary, under every theory adumbrated, that claim must be rejected. From *Allen-Bradley* to *Pennington*, the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors. The line the Court has consistently sought to draw, therefore, is the line between the product market and the labor market. Thus it was that Justice White's inquiry in *Jewel Tea* focused on whether the matter in question was a mandatory subject of bargaining and of importance to the union, and was not simply a device Jewel's competitors might employ to weaken its competitive position in the product market. Once it was determined that the marketing hours provision affected working hours as well, the inquiry was at a close. And in *Pennington*, antitrust liability was explicitly bottomed on union involvement in an employer conspiracy to drive competitors from the product market. Mr. Justice Goldberg's dissent declined to go even this far and took the flat position that all mandatory subjects of bargaining are exempt from antitrust liability, no matter what their impact on the product market. We emphasize this, not because the Justice is now counsel for *Flood*, but to demonstrate that there has not been the slightest suggestion by anyone on the Court

67. *Id.* at 665-66.

68. *Id.* at 672.

69. *Id.* at 714.

that the antitrust laws have the sweeping effect on collective bargaining urged by Flood. Quite the contrary, the issue has been whether even to go so far as to impose antitrust sanctions for the kind of product market activities involved in *Pennington*.

That the reserve clause, as raised in *Flood*, is strictly a labor market issue seems plain, and, as a result, cannot give rise to antitrust liability. Surely a union butcher who desired to work at night could not challenge the contractual provision agreed upon in *Jewel Tea*. Upholding such a challenge would effectively destroy collective bargaining by undermining the authority of the bargaining representative and would involve the courts in rewriting potentially every collective agreement in the country at the behest of individual employees. Nor is a different result called for when the union opposes the employer proposals. For then the gist of the antitrust theory is little more than that hard bargaining by employers with unions violates the Sherman Act, a claim that can be pressed against wage proposals thought to be too "low," as well as the reserve clause.

The reasoning above also supports the conclusion that the players have no standing to pursue an antitrust suit against the basketball merger. The merger may well be illegal because of its impact in other markets but the players have no stake, other than as private citizens, in that impact. Whatever injury they suffer is in the labor market and we submit that their remedy, if any, lies in the labor laws.⁷⁰

This discussion has relevance to the issues before Congress as well as to the issues before the Court in *Flood*. Senator Ervin has introduced legislation explicitly subjecting professional sports to the antitrust laws. We have no quarrel with such legislation in its literal form. Our argument above is that the reserve or option clause is not properly an antitrust issue *when raised by a player in a unit with an exclusive collective bargaining representative*. Our fear is merely that the legislative history will suggest that the pending legislation is an invitation by Congress to the courts to intervene at large in collective bargaining relationships, in which case it will wreak havoc with the labor laws. This fear, however, is no justification for abandoning the proposed legislation, for there may well be practices in professional sports which are not immunized by labor policy and which ought to be made to pass antitrust muster.

To take a non-random illustration, the reserve clause may, in other

70. Such a remedy might be an unfair labor practice charge that the leagues refused to discuss the impact of a merger on terms and conditions of employment. Another remedy, of course, is the strike.

circumstances, violate the antitrust laws. We have noted that reserve or option clauses are not serious antitrust issues when raised by members of a bargaining unit. Players are not, however, the only potential plaintiffs. For example, imagine a club owner who is dissatisfied with the restrictions imposed on him by a reserve clause system of player allocation and wants to "steal" players from the other teams. He might well make the claim that the clause, even if in a collective agreement, was a tactic of his "competitors" designed to prevent him from putting together as good a team as he could, just as the plaintiff in *Jewel Tea* claimed the marketing hours restriction was designed to limit his ability to compete. To be sure, this claim might not succeed. If only one league were involved, a court might well decide that the league, rather than the individual teams, was the "firm," on the grounds that consumer satisfaction required relatively evenly matched contests and centralized control. Or it might conclude, as Mr. Justice White seems to have done in *Jewel Tea*, that the clause was not in fact designed to restrain product competition. A stronger argument might be made by a newly-formed league that a collective agreement between an established league and players' union which, for example, permitted suits for injunction against players who attempted to "jump" leagues, was designed to prevent the new league from gaining access to the best players and to consign it permanently to second class status. This claim is similar to the one which succeeded in *Allen-Bradley*: a union-employer combination to exclude entry by newcomers. Such cases seem paradoxical, for they challenge the very same economic transactions the players are disputing. Nevertheless, they seek to embrace the theory of *Allen-Bradley* and its progeny and do not entail the frontal assault on national labor policy threatened by *Flood*. Limiting antitrust claims to product competitors who have suffered direct and actual injury endangers far fewer collective agreements than permitting suits by individual employees, for in the latter case virtually every agreement could be challenged. We express no opinion on the merits of claims by rival leagues or maverick owners. We do, however, think they illustrate the need to look further into the impact of the labor laws on professional sports.

IV. Conclusion

The reserve and option clause issue is, therefore, miscast as an antitrust problem in those sports where players' unions are recognized—at least when the players bring the challenge. Indeed, one of the

reasons this simmering question now boils is the growth of unions which can carry on the litigation and lobbying necessary to a systematic attack on the system. Their very existence seems to us, however, to entail a radical change in the legal status of the reserve clause, for if professional athletes are to engage in collective bargaining and have the right to strike, the usual principles of labor law should apply.

We conclude that certiorari was improvidently granted in *Flood* and the Court should so rule. In opposing Flood's petition for certiorari the defendants did not bring the labor issues to the Court's attention, a failure which lent an undeserved aura of importance to *Toolson*. Although the problems of stare decisis raised are interesting, *Toolson* is no longer the critical barrier to Flood's challenge; the defendants have an absolute defense on the merits, grounded in labor law. Nor should the Court overrule *Toolson* and remand the remaining questions. It is fruitless to remand what are frivolous claims, particularly when they will be used as a bargaining lever in the very process they seek to undermine: collective bargaining.

The existence of players' unions does not, however, foreclose Congress from writing legislation explicitly outlawing the reserve clause and its variants. We oppose such legislation, not because we like the clause but for two quite different reasons. First, there is not a shred of justification for outlawing the reserve system and leaving the players with the right to strike. If government is to intervene, it should do so as a substitute for, rather than a supplement to, collective bargaining—which is to say professional athletes should not be covered by the National Labor Relations Act and should not have the right to strike.

Second, the reasons for disliking the clause are reasons for disliking many aspects of collective bargaining. If reform is to be undertaken, it should be generalized. For example, Senator Ervin has analogized the basketball common draft to "the newspaper profession deciding that a college journalism graduate could either work for the newspaper in Anchorage, Alaska at the salary offered or not work at all."⁷¹ We endorse the libertarian sentiments of this statement but disagree with the implication that such restrictions are uncommon in the economy. To take just one example, no electrician in Anchorage, Alaska, would be so naive as to think he can go anywhere he pleases in the United States to practice his trade. And if Congress is going to undo restrictions on employment, it should consider electricians as well as athletes.

71. 117 CONG. REC. S15451 (daily ed. Sept. 30, 1971).